Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1999

RENE M. DARBY,

and

DIRECTOR,

OFFICE WORKERS' COMPENSATION PROGRAMS,

Petitioner,

vs.

INGALLS SHIPBUILDING, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court previously established in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), guidelines to govern the award of attorney's fees in cases adjudicating irrevocably intertwined claims for relief. The necessity of complying with established guidelines concerning awards in irrevocably intertwined cases is of particular importance to that class of claimants who are returned to work under the Longshore and Harbor Workers' Compensation Act ("Longshore Act"), 33 U.S.C. §901 *et seq.*, and subsequently reinjured in the course of employment. The lack of adequate administrative procedures within the Department of Labor requires that this class of reinjured workers simultaneously prosecute multiple injury claims in order to protect their interests, with the result being the incursion of extensive legal expenses. The resulting legal expenses are usually challenged by employers after the reinjured worker successfully prosecutes the injury claims, in spite of the fact that employers manipulate this administrative oversight in order to delay final adjudication of these claims in their entirety. Although this Court crafted appropriate guidelines in *Hensley* for situations involving interrelated claims, there is not uniform adherence to these guidelines by the courts and agencies administrating the Longshore Act. The result is that the class of workers reinjured after returning to work are at risk of being deprived of legal representation necessary for the protection of their work-injury claims and future interests.

The Questions Presented are:

1 . Does the award of concurrent permanent disability benefits for multiple interrelated Longshore Act claims constitute the successful prosecution of intertwined claims

or otherwise require adherence by an adjudicating body to the guidelines and procedures set forth in Hensley v. Eckerhart?

2. Does an adjudicating body deny the right of counsel to a specific class of Longshore Act claimants when it fails to award attorney's fees to reinjured claimants for the successful prosecution of multiple work-related injury claims

3. Does an appellate court of the United States have the authority to ignore and thereby suspend the operation of the Federal Rules of Appellate Procedure and its own local rules, in order to preclude the filing of a timely suggestion for *en banc* consideration of a dispositive issue in an appeal?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner in this case is Rene Darby. He was the claimant in two (2) work-related injury claims administrated by the Office of Workers' Compensation Programs, and an appellant before the Benefits Review Board and the United States Court of Appeals for the Fifth Circuit. In the appeal before the Fifth Circuit, the Director of the Office of Workers' Compensation Programs was aligned with the Petitioner.

The Respondent is Ingalls Shipbuilding, Inc., believed to be a wholly owned subsidiary of Litton Industries. The Respondent was the employer of Rene Darby at all times relevant to these claims.

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IN THE
SUPREME COURT OF THE UNITED STATES

RENE M. DARBY
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DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Petitioners

vs.

INGALLS SHIPBUILDING, INC.
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Rene M. Darby ("Darby") hereby petitions this Court to grant a writ of certiorari to review the judgments and actions of the United States Court of Appeals for the Fifth Circuit in Cause Nos. 96-60029 and 99-60567, the judgments at issue being the order of June 11, 1999, the order denying rehearing dated July 13, 1999, the August 19, 1999 order denying leave to file a timely received suggestion for *en banc* consideration, and the order of December 2, 1999 dismissing the appeal from the 1999 Benefits Review Board as frivolous.

OPINIONS BELOW

The orders of the Fifth Circuit Court of Appeals issued in Cause No. 9260029 are reprinted in the Appendix at la-3a. The initial 1996 opinion of the Fifth Circuit in that matter is reported at 99 F.3d 685 and reprinted in the Appendix at 6a-13a. The opinions of the Office of Administrative Law Judges establishing the Darby's entitlement to fee awards are reprinted in the Appendix at 14a-67a. The December 2, 1999 order of the Fifth Circuit Court of Appeals in Cause No. 99-60567, dismissing the review of the Benefits Review Board's order denying attorney's fees, is reprinted in the Appendix at 4a-5a. The August 20, 1999 opinion of the Benefits Review Board, as appealed in Cause No. 9960567, is reprinted in the Appendix 68a-72a.

JURISDICTION

The order of the Court of Appeals for the Fifth Circuit denying the March 26, 1999 fee petition in Cause No. 92-60029 was filed on June 11, 1999. Pet. App. 1 a. Darby filed a timely request for rehearing by the panel, which was denied on July 13, 1999. Pet. App. 2a. A petition for review of a Benefit Review Board denying a related claim for attorney's fees was filed with the Fifth Circuit on August 24, 1999 and assigned Cause No. 99-60567. This cause was dismissed on December 2, 1999, for the stated reason that the appeal was frivolous. Pet. App. 4a-5a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(l).

STATUTORY PROVISIONS INVOLVED

The pertinent sections of 33 U.S.C. §901 et seq. ("Longshore Act"), specifically §§ 908(f), 922 and 928, are

reprinted in the Appendix at 75a-78a.

STATEMENT OF THE CASE

A. Introduction and Summary

This case results from the denial of fee petitions filed with the Fifth Circuit Court of Appeals and the Benefits Review Board for legal services rendered in a successful prosecution of intertwined claims for permanent disability benefits under the Longshore Act. The case involved multiple injuries and irrevocably interrelated claims for benefits due to disabling neck and back injuries, which the treating physician addressed as one injury because of interrelation through aggravation and reinjury. The failure of the Department of Labor and its Office of Workers' Compensation Programs to implement adequate and expeditious procedures to consolidate and adjudicate multiple pending work-injury claims under the Longshore Act resulted in Darby being required to simultaneously prosecute multiple claims for benefits before different agencies and courts. Darby ultimately received a concurrent award of permanent disability benefits from the Office of Administrative Law Judges for his claims arising from the initial 1987 injury and his 1992 reinjury. Because Darby was required to simultaneously prosecute multiple interrelated claims, the employer opposed the fee petitions related to the initial work injury as being unnecessary. Both the Fifth Circuit Court of Appeals and the Benefits Review Board accepted the employer's argument. This action was in disregard of the administrative law judge's specific award of concurrent benefits for both injuries. Pet. App. 61 a and 65a. The denial of these fee petitions by the Fifth Circuit and the Benefits Review Board was also in contradiction and disregard of the directives contained in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Section 8(f) of the Longshore Act clearly anticipates that a certain class of injured workers will be returned to work in lieu of compensatory benefits and that this class of workers will be reinjured. In spite of the statutory anticipation of further injury, the Department of Labor has not implemented administrative procedures that would protect this class of injured workers by consolidating multiple claims simultaneously pending before different agencies or courts, and thereby lessening a claimant's need for and the resulting expense of simultaneous legal representation. A lack of adequate administrative procedures makes it necessary for this class of claimants to prosecute independently a series of irrevocably intertwined injury claims before different agencies and courts, until such time as those claims on appeal can be remanded to the appropriate agency for further fact finding and the award of benefits.

In instances where multiple interrelated claims are pending before different agencies or courts, an employer can both forestall the final adjudication of the respective injury claims through attrition in hopes of obtaining both a beneficial settlement of these claims and, after attorney's fees are granted, seek a reduction or disallowance of the fee award by alleging that multiple prosecutions of the claims were not necessary. This type of defense is contrary to the Longshore Act's intent and purpose of protecting injured workers and providing them with adequate legal representation for their injury claims. Such manipulation of administrative practices also discounts and undermines the requirement that a claimant under the Act obtain benefits for a specific injury in order to protect the right to future modification under Section 22. Denying the payment of necessary legal fees to a successful claimant's attorney also risks driving competent counsel from the field of representing injured maritime

workers. Such a deprivation of legal representation could ultimately result in assertions against the Department of Labor that the fee award provisions of the Longshore Act are administrated in an unconstitutional manner.

This Court previously addressed in *Hensley* the issue of statutory fee awards in instances of irrevocably intertwined injuries which necessitate independent prosecutions but may not produce readily apparent benefits. Where a party's injuries or claims become irrevocably intertwined, an equitable consideration of both claims is required in regard to any relief granted for his injuries. In many instances a claimant may be forced to seek relief that is related to the core claim which, by itself, does not produce a tangible result or readily apparent benefits but, when viewing the entire claim and those related issues, may be necessary. This is particularly true in this instance, where Darby suffered intertwined neck and back injuries between 1987 and 1992, in addition to an arm injury sustained in conjunction with the initial 1987 neck injury. The administrative procedures of the Office of Workers' Compensation Programs required that both injury files be prosecuted independently before different agencies in order to obtain appropriate benefits for these injuries and to preserve the right to future modification of the benefit awards.

Events occurring during the spring of 1992 necessitated both the appeal of the March 20, 1992 administrative decision and the separate prosecution of those claims arising from the new injury. It would have been prejudicial to Darby's interests to abandon all rights and claims related to the 1987 OWCP file. Ethical considerations also precluded his attorney from advising him to abandon the initial 1987 claim. Past conduct by the employer clearly indicated that

there would be a full controversion of all claims alleging a loss of wage-earning capacity and permanent disability. The interrelated nature of these injuries would have also given the employer an extremely attractive opportunity to allege opportunistic defenses if the 1987 OWCP claim had been abandoned. In circumstances such as these, it is well -established that a claimant is entitled to full compensation of necessary legal services.

This Petition does not present a situation which urges the expansion or reversal of present statutory or interpretive law. The primary issue presented is very simple: was the Fifth Circuit required to adhere to the directives of the *Hensley* decision and either 1) grant Darby a fee award for legal services rendered during his appeals of those claims set referenced in the 1987 OWCP file, or 2) comply with the directives in *Hensley* which require a sufficient and reasoned explanation concerning those fees which are denied or reduced in irrevocably intertwined claims? The administrative record shows that Darby received concurrent permanent disability benefits for both the 1987 and 1992 injuries. Clearly there was substantial success on both claims. If the Fifth Circuit interpreted the benefit award differently from the clear language of the administrative decisions, the court was still required to make a proper analysis of the fee petitions and provide an adequate explanation of its rationale for denying or reducing the fee. To allow the Fifth Circuit's decisions on this issue to stand without reversal or clarification will provide maritime employers with precedent to make future challenges to the fee petitions of that class of injured workers having multiple intertwined injuries. For this reason, the Court should use this opportunity to provide guidance to both claimants and employers governed by the Longshore Act as to whether awards of concurrent benefits

in interrelated injury claims substantiate the payment of a claimant's necessary fees resulting from multiple prosecutions.

B. Statement of the Facts

The orders at issue in this Petition relate to attorney fee petitions filed for legal services provided Darby during the period of 1992 to 1996 in his appeal of the administrative order denying permanent benefits for non-scheduled injuries sustained in 1987. On November 13, 1996, the Fifth Circuit Court of Appeals remanded the 1987 claim to the Office of Administrative Law Judges due to errors in the determination of Darby's loss of wage-earning capacity, Pet. App. 6a-13a. After remand Darby successfully prosecuted concurrent claims for permanent disability benefits due to his 1987 and 1992 injuries. Pet. App. 61a. Pursuant to an award of attorney's fees, appropriate fee petitions were filed with the Fifth Circuit Court of Appeals and the Benefits Review Board for legal services rendered in Fifth Circuit Cause No. 92-60029 and BRB No. 92-1547, respectively.

On June 11, 1999 the circuit court denied Darby any compensation for legal services related to the 1996 appeal. Pet. App. la. The order did not explain the disregard of the disability benefits obtained on remand or why there was no obligation to comply with the mandate and procedures set forth in *Hensley v. Eckerhart, supra.* A timely petition for rehearing was filed with the Fifth Circuit panel setting forth specific reasons why a fee award was required in this instance. The petition for rehearing was denied by the panel on July 13, 1999, again without explanation of the panel's rational or its failure to consider the conflict between its order and those decisions by this Court which controlled the

matters at issue. Pet. App. 2a. A timely suggestion for *en banc* consideration was filed on July 26, 1999. The clerk of the Fifth Circuit initially refused to file the *en banc suggestion* for the stated reason that this pleading did not address a dispositive issue. The clerk's action was in disregard of the fact that the request for en banc consideration was filed within the fourteen (14) day period specified in the Federal Rules of Appellate Procedure and that it complied with all applicable federal and local appellate rules governing *en banc* proceedings. The *en banc* pleadings were return to the clerk and the propriety of his failure to file the suggestion challenged. The clerk referred the matter to the panel and an order was signed by a single judge of the panel on August 19, 1999, which denied the Petitioner leave to file the suggestion for *en banc* consideration. Pet. App. 3a. No explanation was given by the court for its failure to adhere to the Federal Rules of Appellate Procedure governing the filing of an *en banc* suggestion.

Regarding the fee petition filed with the Benefits Review Board for legal services provided in BRB No. 92-1547, the Board initially denied the entire fee petition on May 24, 1999. There was no explanation by the Board as to why it ignored the concurrent award of permanent disability benefits or why it was not required to comply with the procedures set forth in *Hensley*. A timely motion for rehearing was filed with the Board. On August 20, 1999, the Board denied the fee petition but did attempt to explain its decision. Pet. App. 68a-72a. Unfortunately the explanation was a misapplication of controlling authority and evidenced an attempt by the Board to engage in impermissible fact-finding in order to justify its opinion. A petition for review was filed with the Fifth Circuit Court of Appeals on August 24, 1999, and the fee petition with the Board was assigned Cause No.

99-60567 by the Fifth Circuit. Darby designated the Board's failure to recognize his concurrent disability award, its attempts at factfinding and its effective denial of the right to counsel as issues for review.

On October 27, 1999, the employer moved the Fifth Circuit to dismiss the appeal of the Board's order in Cause No. 99-60567. The employer relied on the court's prior denial of the fee petition in Cause No. 99-60567 as grounds for asserting a frivolous appeal. Although other issues besides entitlement to a fee award were presented to the Fifth Circuit in this second cause, the court again avoided resolving the conflicts concerning a fee entitlement by dismissing the petition for review on December 2, 1999. Pet. App. 4a-5a. This order failed to address any of the issues designed on appeal from the Benefits Review Board or previously presented in Fifth Circuit Cause No. 96-60029.

Darby's initial disability claim originated as a result of injuries sustained on September 24, 1987 in the course of his employment. The injury was assigned OWCP No. 6-110624. At the time of the 1987 accident, Darby was a twenty-three (23) year old shipyard worker in robust health. During the next three (3) years, surgery was necessary for an ulnar transposition in the left elbow and two (2) levels of cervical fusion caused by the work injury. In spite of admonitions by the treating physician against further employment at a shipyard, the employer returned Darby to work at its facility in October 1990. After an October 1991 hearing before the Office of Administrative Law Judges, the presiding judge ruled that the proffered job constituted suitable employment and denied permanent disability benefits for unscheduled injuries to his neck.[1] A timely appeal of this

1 However the administrative law judge did award permanent disability benefits for injuries sustained to the left arm.

decision was filed with the Benefits Review Board, which upheld the administrative law judge's findings. An appeal of the Board's decision was filed with the Court of Appeals for the Fifth Circuit. In the appeal, the Director of the Office of Workers' Compensation Programs was aligned with Darby. On November 13, 1996, the Fifth Circuit held that the administrative law judge had failed to make a proper determination of Darby's post-injury wage-earning capacity and remanded the case to the Office of Administrative Law Judges for further findings consistent with the opinion.

As anticipated by the treating physician, shipyard work proved too strenuous due to Darby's physical limitations. He suffered further injury to his pre-existing neck injuries in a work-related accident on May 8, 1992. He also sustained a new back injury in this accident. The 1992 accident was assigned OWCP No. 6-145508. A lack of adequate procedures for the consolidation and joint adjudication of related injury claims required Darby to prosecute OWCP Nos. 6-110624 and 6-145508 separately in order to protect his rights under the Longshore Act. It was suspected that the employer would alleged defenses arising from OWCP No. 6-110624 as procedural bars against the claims in OWCP No. 6-145508, if the 1987 claims were abandoned. This suspicion was not without merit, as the employer had controverted liability on September 8, 1992 for cervical injuries diagnosed after the May 1992 accident. Additionally the employer had previously attempted to interpose opportunistic defenses in response to the 1987 claim.[2]

After the remand of the 1987 claim by the Fifth Circuit Court of Appeals, the 1987 and 1992 OWCP files

2 The employer previously attempted at a 1991 deposition of the treating physician to allege that Darby's cervical injuries resulted from tilting his head back too far while being shampooed.

were consolidated for hearing. The sole claim presented after remand was a claim of entitlement to permanent disability benefits resulting from the intertwined cervical injuries sustained in the 1987 and 1992 accidents. The respective claims involved injuries to either the same or adjoining cervical levels. Darby suffered disc damage in the 1987 accident, resulting in cervical fusions at C4-5 and C5-6. This accident also caused permanent disability to the left arm. On April 4, 1990, the treating physician observed further disc problems at C6-7. He subsequently determined that Darby had exacerbated the injury at C6-7 and suffered an new back injury at an adjoining cervical level in the 1992 accident. Since 1990 Darby has been diagnosed as having thoracic defects that are essentially inoperable.

The administrative law judge subsequently ruled on April 15, 1998, that the employer had failed to provide suitable alternative employment and that there was a loss of permanent wage-earning capacity due to the combined effect of both injuries. Pet. App. 52a and 58a-59a. The decision awarding benefits did not fully address Darby's rights in the 1987 OWCP claim file, and a motion for clarification of the benefits award was filed. A specific finding was issued on June 25, 1998 which clearly stated that the award of permanent disability benefits was compensation for both the 1987 and 1992 injuries. Pet. App. 65a-66a. Based on this finding, the administrative law judge determined that a *de minimus* award was not necessary for the 1987 injury, as future rights regarding the 1987 injury were protected by his benefit award.

The administrative law judge also ruled that Darbys attorney was entitled to fee awards as a result of his successful prosecution of the disability claims. Pet. App. 60a. Fee

petitions were subsequently filed with the Fifth Circuit Court of Appeals and the Benefits Review Board seeking compensation for legal services provided during the appeal of the 1992 administrative order. Both fee petitions were denied. In both cases presented to it, the Fifth Circuit failed to explain its deviation from the directives in *Hensley v. Eckerhart, supra,* which would be controlling on the issue of an award of attorneys' fees arising from irrevocably intertwined claims. Based upon the issues stated, herein, Darby seeks a Writ of Certiorari from this Court remanding the respective cases to the Court of Appeals for the Fifth Circuit and the Benefit Review Board, with instructions that the petitions for attorney's fees be adjudicated in conformity with the decision in *Hensley.*

REASONS FOR GRANTING THE WRIT

The Failure of the Fifth Circuit to Follow the Directives of this Court Concerning Fee Awards under Federal Statutes Undermines Injured Workers' Right to Counsel

This Court should grant certiorari to consider whether the Fifth Circuit Court of Appeals and the Benefits Review Board complied with the directives set forth in *Hensley v. Eckerhart* in their adjudication of Darby's fee petitions, and whether there was proper consideration of Darby's concurrent permanent disability benefits awards. It is important to conclusively recognize an injured worker's right to counsel and adequate legal representation in contested cases involving multiple injury claims. The right to counsel is reinforced through the payment of necessary legal services that produce successful results. The Longshore Act allows for and offers incentives for an employer to return to

work those claimants with non-scheduled work injuries, and considering that Section 8(f) anticipates reinjury to this class of claimants after their return to work, it is quite logical that the present factual scenario of an injured worker having multiple injury claims pending at the same time will repeat itself in the future. For the benefit of injured claimants and their attorneys, the Court should use this opportunity to craft clear and concise guidelines concerning Longshore Act claimants' right to counsel and their attorneys' obligations when faced with multiple contested injury claims.

1. The Fifth Circuit failed to adhere to guidelines established by this Court regarding the award of attorney's fees in instances of irrevocably intertwined claims.

The administrative law judge's June 25, 1998 order made a specific finding that Darby sustained a loss of wage earning capacity due to both the 1987 injury and the 1992 aggravation. In discussing the effect of the 1992 aggravation on the 1987 injury, the administrative law judge found the award of permanent partial disability to be compensation for both injuries.

> "While under the Act, this [1992] aggravation was a 'new injury,' it clearly arose out of the original 1987 injury. Thus, any present loss in wage earning capacity is a product of the combination of the 1987 injury and the 1992 aggravation ... In other words, the original injuries suffered in 1987 are accounted for in the award of permanent partial disability benefits...In this case, Claimant certainly has a present loss of wage earning capacity, due to both his 1987 injury and his 1992 aggravation." Pet. App. 65a.

The combined effects of Darby's injuries and resulting increase in the level of disability was one reason the administrative law judge provided the employer partial indemnification under Section 8(f) of the Longshore Act. The award of concurrent disability benefits and the discussion of the basis for granting Section 8(f) relief show that a pro rata division of the permanent disability award was not possible.

Section 28(b) of the Longshore Act provides attorney's fees where a "claimant uses the services of an attorney to successfully recover the total amount claimed." *Savannah Machine & Shipyard Co. v. Director*, 642 F.2d 887, 889 (5th Cir. 1981). In providing for attorney's fees, the statutory scheme of the Act recognizes that injured employees will generally require effective representation by counsel to aid them in obtaining the compensation they are entitled to receive, be it large or small. The proper test for determining if the attorney's work is necessary is whether, at the time the attorney performs the work in question, he could reasonably regard the work as necessary to establish entitlement to relief under the Longshore Act. *Cabral v. General Dynamics*, 13 BRBS 97 (1981); *Cherry v- Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS (1978); *Marcum v. Director,* OWCP, 12 BRBS 355 (1980); *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991). Time spent and services rendered on behalf of a claimant that are reasonably necessary to protect a claimant's interest are compensable. *Marcum v. Director*, OWCP, supra; *Hensley v. Eckerhart, supra.*

Where the results obtained constitute the total accomplishment of the aims of the case, a fee award is proper, even if the claimant does not prevail on minor contentions

related to the primary claim. *Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483, 484 (W.D.N.C. 1975). "If work on unsuccessful issues could not be compensated, the quality of the advocacy claimants receive would be adversely affected ... [w]e hold that a determination of the reasonable necessity of professional services cannot be made purely on the basis of whether the work related to an issue on which the claimant was ultimately successful.. All counsel's services can be considered for a fee award, as long as he succeeded in increasing the claimant's entitlement to compensation as provided for in Section 28 of the Act." *Cherry, supra, 8 BRBS at 863-4.*

There is a clear distinction between the failure of a claimant to prevail on related or collateral issues and a failure to prevail on distinctly different or unrelated claims. The determination of compensability for legal services is based on whether the claimant prevailed on his claim and not on every single issue of that claim. *Hilyer v. Morrison-Knudson Construction Co.*, 12 BRBS 87 (1980); *Cherry v. Newport News Shipbuilding & Drydock Co., supra, Nooner v. National Steel & Shipyard Co.*, 19 BRBS 43 (1986). "In most cases, the issues are too intertwined to permit allocation of the fee between successful issues and unsuccessful issues." *Battle v. A.J. Ellis Construction Co.*, 16 BRBS 329, 331 (1984).

Darby was entitled to the payment of his legal fees for work performed before the Fifth Circuit and the Benefits Review Board. The 1987 and 1992 injuries had clearly become irrevocably intertwined before the appeal was perfected to the Fifth Circuit. The employer elected at an early stage of the proceedings to controvert the 1992 cervical injuries and continued its opposition to paying permanent

disability benefits, even after the second injury in 1992. Ultimately there was a finding that Darby had sustained a loss of wage-earning capacity due to both injuries. Pet. App. 65a. The results obtained before the administrative law judge constituted a successful and total resolution of his combined claims. If a counsel is ultimately successful in procuring compensation benefits under the Longshore Act, he is entitled to fees for all services rendered at each level of the adjudication process. *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981).

This Court's opinion in Hensley v. Eckerhart, supra, discusses the standards for determining a fee award to prevailing parties under federal statutes and the factors that are to be considered in those awards. It also discusses situations in which claims may be intertwined to the point that it is, for all practical purposes, impossible to differentiate them. The analysis *Hensley* uses for establishing entitlement to a fee is as follows: First, did the plaintiff fail to prevail on the claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Under the *Hensley* analysis, Darby passes the first test. Both claims at issue were solely related to Darby's request for permanent disability benefits resulting from non-scheduled injuries to adjoining cervical levels. If the claims are interrelated, a court is to skip the first step of the *Hensley* inquiry and move to the second step. *The George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 1537 (D.C. Cir. 1992). Darby's loss of wage-earning capacity established in the 1998 administrative decisions will net permanent disability benefits of approximately Two Hundred Eighty

Thousand Dollars ($280,000) during the remainder of his life. These benefits could increase to approximately Six Hundred Thousand Dollars ($600,000) if his wage-earning capacity remains at the post-hearing level and there is modification. Additionally his rights to seek future modification and medical benefits are assured in both claims. Comparing these benefits with the Two Hundred Sixty-six and 625/1000 (266.625) hours spent by his counsel on the appeal of these claims during the five (5) year period between April 3, 1992 and the remand by the Fifth Circuit in 1996, the effort expended on behalf of Darby was both reasonable and necessary.

This Court recognized in *Hensley* that in many instances, a claimant may be forced to seek relief related to the claim which, by itself, does not produce a distinct or tangible result but, when viewing the entire claim and related issues, may be necessary.

> "In some cases ... claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the [ALJ] should focus on the significance of the overall relief obtained by the [claimant] in relation to the hours reasonably expended on the litigation.
>
> Where a [claimant] has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some

> cases of exceptional success an enhanced fee may be justified. In these circumstances the fee award should not be reduced simply because the [claimant] failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for the desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The results are what matters."

Hensley, at 434-35. This Court further stated that the fact finder should make an equitable judgment based upon all of the circumstances of the litigation. *Id.* at 437.

Justice Brennan wrote in his concurrence with the *Hensley* decision, that defendants generally have an incentive to delay a case in hopes that the delay with force the claimant to give up. "Defendants.. have much to gain by dragging out litigation. The longer litigation proceeds, with no prospect of improved results, the more pressure plaintiffs and their attorneys may feel to compromise their claims or simply give up." *Hensley*, at 456. The primary issue posed in this Petition is the precise danger that Justice Brennan envisioned in his concurrence. When obstacles continuously undermine the efforts of successful claimants to collect fee awards, it is highly probable that lawyers will be reluctant to undertake representation of injured workers under federal workers' compensation statutes. When faced with the inability to collect fees for services rendered, the bar of attorneys representing Longshore Act claimants could dwindle and claimants loose the ability to secure adequate representation.

2. The failure of the Fifth Circuit and Benefits Review Board to award attorney's fees in this instance constitutes an

impermissible interference with a Longshore Act claimant's right to counsel.

Due process and equal protection considerations afforded under the Fifth Amendment require that a litigant be afforded specific rights under the United States Constitution. In the case of an injured worker under the Longshore Act, the claimant is precluded from contracting to personally pay the expense of prosecuting his claim due to the prohibitions in Section 28. This restraint on the right to contract creates tension because of limitations placed a Longshore Act claimant's right to contract with an attorney, whereas no such restraints exist on an employer. This is particularly true when there fails to be a realistic "no fault" administration of injured workers' claims and employers undertake to preclude the award of benefits through aggressive opposition and continuing delay. In these circumstances, an injured worker is very vulnerable to an employer's ability to pay for its legal services promptly and without the restraints imposed on Longshore Act claimants and their attorneys. Under such conditions, a claimant's counsel needs to be assured that established precedent controlling the award of legal fees will be followed and uniformly applied. The right to counsel is of special importance to that class of reinjured workers, such as Darby, who fall under the provisions of Section 8(f). In cases of multiple injury and reinjury, an injured worker is exceedingly vulnerable to an employer's tactics designed to lessen its liability for permanent disability benefits and there needs to be assurance that his attorney will not abandon the case. If counsel cannot be assured of payment for successfully prosecuting irrevocably intertwined claims, injured workers may discover that they are no longer able to obtain adequate representation.

A civil litigant has a constitutional right deriving from due process to retain counsel in a civil case. *Gray v. New England Telephone and Telegraph Co.*, 792 F.2d 251 (1st, Cir. 1986). Impairment of the obligations by an attorney to his client can be unconstitutional under the due process clause because it denies the client access to the courts. *Martin v. Lauer*, 686 F~2d 24 (D.C.Cir. 1982). The failure to pay for Darby's necessary legal services referenced in these fee petitions could substantiate a claim that he and his class of reinjured workers are deprived of rights secured by the Constitution or the laws of the United States, and that the deprivation of those rights were committed under color of law by the respective agencies or courts of the United States. These assertions would fulfill the requirements recognized by this Court that there be both 1) an alleged constitutional deprivation and 2) that the party charged with the deprivation must be an entity rightfully alleged to be a governmental actor. By failing to award attorney's fees in compliance with the directives in *Hensley v. Eckerhart, supra,* the Fifth Circuit and the Benefits Review Board fulfilled the role of a governmental actor by depriving Darby's class of claimants of their right to counsel. In disregard of the concurrent award of permanent disability benefits, the Fifth Circuit interposed its own interpretation on the award and denied Darby payment of legal services provided before that court and the Benefits Review Board. It is beyond the competence of a court to pick and choose among plaintiffs and the statutes under which they seek relief, and to award fees in some cases but not in others. *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 269 (1975).

It is fiction to allege that the failure to pay for necessary legal services on related injury claims does not deprive a claimant of his right to counsel, the right to access the

courts, and the right to freely contract for necessary legal representation. By depriving a claimant's counsel an award of fees in successful claims, there is a substantial risk that other counsel will withdraw from the field of representing injured workers under the federal workers' compensation statutes. In *U.S. Department of Labor v. Triplett*, 494 U.S. 715, 110 S.Ct. 1428, 1434 (1990), Justice Scalia stated that a claim of constitutional violation could be made by showing that attorneys left the field of claimant representation in workers' compensation claims administrated by the Department of Labor due to improper administration of the fee award procedure. By denying a claimant's fee application in cases involving a successful prosecution of multiple injury claims, those legal services necessitated by the injuries are effectively denied to that claimant and future claimants similarly situated. This results in a violation of injured workers' fundamental right to legal representation in Longshore Act claims and further serves as an impermissible restraint of the claimants' right to contract and obtain access to justice.

One purpose of the Longshore Act is to provide a reasonable remedy for the claims of an injured worker. The Act and its implementing regulations are not intended to deprive claimants of legal representation through inconcise guidelines and decisions that are not uniformly applied. To the contrary, the interests of an injured worker are not to be circumvented by reliance on overly technical interpretations of the statute or related authority. *International Mercantile Marine Co. v. Lowe*, 93 F.2d 663 (2nd Cir. 1938). The ethical obligations of a claimant's counsel must also be considered. Once counsel has been properly secured by a claimant, the attorney has an ethical obligation to protect the interests of his client and the potential amount of recovery should not interfere with that ethical obligation. *Bullock v. Ingalls*

Shipbuilding, Inc., 27 BRBS 90 (1993). Where multiple injuries are irrevocably interrelated, it is necessary that the agencies of the Department of Labor and the courts interpreting these statutes follow this Court's decision and guidelines set forth in *Hensley v. Eckerhart, supra*, and not engage in overly technical interpretations of a benefit award or otherwise subjectively formulate parameters designed to preclude benefits which a claimant is entitled.

In support of his assertion that the appeal of the 1992 administrative decision was necessary, Darby would show that the natural progression of his elbow and arm injuries sustained in the original 1987 accident necessitated the filing on May 20, 1999 for a motion for Section 22 modification of the benefits previously awarded for his 1987 arm injuries.[3] If the appeal of the 1987 injury claims had not been successfully prosecuted, the recent motion of modification would have been barred by the statute, which precludes modification of an award if more than one (1) year has passed since the last payment of compensation. The necessity of the 1992 appeal is further substantiated by the employer's subsequent objection to modification. In disregard of the current 1998 benefit award, the employer now alleges that the statute of limitations bars modification of the 1992 benefit award for the arm injuries. Pet. App. 73a-74a. Based on this evidence, there is no question that 1992 appeal was successful in both obtaining appropriate benefits and protecting Darby's right to future benefits.

3. It was improper for the Fifth Circuit to ignore the provisions of Federal Rule of Appellate Procedure 35 and

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3 As referenced previously, Darby last received compensation in the 1987 OWCP file on March 20, 1992. Footnote 2.

deny the right to file a timely petition for en banc review of those orders in conflict with decisions of this Court

The clerk of the Fifth Circuit Court of Appeals did not have the discretion to refuse to file a suggestion for *en banc* consideration that was submitted within the time period specified by the Federal Rules of Appellate Procedure. Under Rule 35(b)(1), it is necessary that a suggestion for en banc consideration state that the panel decision conflicts with a decision of the United States Supreme Court. This requirement was fulfilled by showing the conflict between *Hensley v. Eckerhart, supra*, and the panel's decision, which disregarded the fact that the Petitioner had succeeded in obtaining disability benefits for his 1987 neck injury and that the two injuries had become irrevocably intertwined. A suggestion for en banc consideration was mailed by US Mail to the clerk on July 26, 1999, the date of filing being within the fourteen (14) day period set forth in the Federal Rule of Appellate Procedure 35(c). There is no published local procedure in the Fifth Circuit that requires an en banc petitioner to first obtain leave of court in order for the clerk to file a petition that is timely. Local Rule 35.2 sets forth the proper form of a suggestion for en banc rehearing. Darby's suggestion of en banc consideration fully complied with the Local Rules. There was no assertion that the filing of the suggestion for en banc consideration was not timely or otherwise barred for failure to comply with applicable rules.

It is not the role of a court to amend or forego procedural rules in accordance with its own policy preferences. *Schiavone v. Fortune*, 750 F.2d 15 (3rd Cir. 1984), *cert granted*, 474 U.S. 814, *aff'd*, 477 U.S. 21 (1986). It was impermissible for the Fifth Circuit to circumvent the applicable court rules in order to achieve a desired result. There is

no dispute that a circuit court can legitimately refuse to allow en banc consideration of procedural or preliminary motions. *Krakoff v. United States,* 431 F-2d 847, *aff'd*, 439 F-2d 1023 (6th Cir. 1971). However the matter at issue in this instance was not a procedural or preliminary matter. Entitlement to attorney's fees was collateral to the disability claim at issue in 1996 appeal. No decision on the claim for attorney's fees could have been made by the Fifth Circuit in conjunction with its 1996 opinion, due to remand of the case for further findings. The fee claim was not ripe for resolution until the administrative law judge awarded attorney's fees. Accordingly the circuit court breached controlling appellate rules and procedures by refusing to file a timely petition for *en banc* determination of the final dispositive issue remaining in Cause No. 96-60029.

Conclusion

For the reasons set forth, this Court should grant the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted, this the 13th day of December, 1999.

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